

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
FILED

BT DEC 10 2004

Michael H. Wilby, Clerk of Court

ROBERT D. STRAUS, JR.,

PLAINTIFF,

vs.

DVC WORLDWIDE, INC., D/B/A DVC;  
SMITHKLINE BEECHAM  
CORPORATION D/B/A  
GLAXOSMITHKLINE,

DEFENDANT.

**H-04-4625**  
Civil Action Number \_\_\_\_\_

**ORIGINAL COMPLAINT**

Robert D. Straus Jr. files this original complaint, complaining of DVC Worldwide, Inc. d/b/a DVC and SmithKline Beecham Corporation d/b/a GlaxoSmithKline as follows:

**JURISDICTION AND VENUE**

1. The court has jurisdiction over these claims under 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a). The court also has jurisdiction over these claims under 28 U.S.C. § 1332 because the plaintiff and defendants are citizens of different states and the amount in controversy exceeds \$75,000, exclusive of interest and costs. Venue is proper in this district under 28 U.S.C. §1391 because a substantial part of the events giving rise to the claims occurred in Harris County, Texas.

**PARTIES AND SERVICE**

2. Robert Straus is a citizen of Texas who lives in Harris County, Texas.

3. DVC Worldwide, Inc. d/b/a DVC ("DVC") is a New Jersey corporation with its principal place of business at 44 Whippany Road, Morristown, New Jersey, 07960. DVC may be served by citation on its registered agent for service, Corporation Trust

Company, at 820 Bear Tavern Road, West Trenton, New Jersey, 08628.

4. SmithKline Beecham Corporation d/b/a GlaxoSmithKline ("GSK") is a Pennsylvania corporation with its principal place of business at One Franklin Plaza, Philadelphia, Pennsylvania, 19102. GSK may be served by citation on its registered agent for service, Corporation Service Company, at 701 Brazos Street, Suite 1050, Austin Texas, 78701.

#### **FACTUAL BACKGROUND**

5. Robert Straus is a professional photographer. In 1989 Mr. Straus created a series of photographs of Arnold Palmer, a professional golfer. These photographs are wholly original with Mr. Straus. One of these photographs was ultimately licensed by DVC for use in certain advertising materials by GSK.

6. On or about January 2, 1997, Mr. Straus registered the photograph as an unpublished work with the Register of Copyrights. The Certificate of Registration is VAu 326-890.

7. On or about June 30, 1999, Mr. Straus again registered this photograph as a published work as it appeared in a book entitled "Arnold Palmer: A Personal Journey" with the Register of Copyrights. The Certificate of Registration number is VA 995-856.

8. The photograph has been licensed for use in many ways, including the cover of the book entitled, "A Golfer's Life." Other licensed uses include magazine covers, posters, advertisements, and as the basis for renderings by artists.

9. In September of 2001, Mr. Straus was approached by advertising agencies, including DVC, on behalf of GSK about licensing one of Mr. Straus's

copyrighted photographs for use as part of an advertising campaign. GSK sought to use the photograph to promote its products, Nicorette smoking cessation gum and NicoDerm CQ patch.

10. Mr. Straus licensed certain uses of the photograph by GSK. The licensed uses were limited to 20,000 displays, 25,000 shelftalks, and 25,000 shelftakes in the United States.<sup>1</sup> All other rights were reserved. The license period for the displays was January, 2002. The initial license period for the shelftalks and shelftakes was November and December, 2001. Mr. Straus granted a subsequent license that extended the license period for 25,000 shelftalks and 25,000 shelftakes to January and February, 2002. The parties discussed further extensions of the license period and licensed uses, however, no other licenses were granted.

11. The Defendants displayed and distributed the copyrighted photograph after the license ended. The Defendants also reproduced, displayed, and distributed the copyrighted photograph in additional, unlicensed, advertising materials, such as "Quitting Together Kits." In addition, the Defendants displayed the copyrighted photograph in unlicensed television advertisements and unlicensed internet advertisements. The Defendants continue to display the copyrighted photograph.

12. Ultimately, the Defendants produced a photograph that they began using in their advertising materials. That photograph is substantially similar to the copyrighted photograph and constitutes a reproduction or a derivative work.

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<sup>1</sup> The terms "displays," "shelftalks," and "sheltakes" are terms of art for certain types of advertising materials used in stores.

**CLAIM FOR COPYRIGHT INFRINGEMENT**

13. The Defendants willfully infringed Mr. Straus's copyright by using his copyrighted photograph and infringing reproductions and derivative works in advertising. Defendants' have violated one or more of Mr. Straus's exclusive rights to his photograph as provided by 17 U.S.C. § 106, including, but not limited to, reproducing his photograph, preparing derivative works of his photograph, distributing copies of his photograph, and publicly displaying his photograph, and thus infringe Mr. Straus's copyright.

14. By reason of the Defendants' infringement, Mr. Straus has sustained and will continue to sustain substantial injury, loss and damage. Mr. Straus is entitled to recover his actual damages sustained as a result of the Defendants' acts of copyright infringement under 17 U.S.C. § 504(b). Mr. Straus is further entitled to recover from the Defendants any and all of their profits as allowed under 17 U.S.C. § 504(b), including, but not limited to, GSK's profits related to the sales of the promoted products and DVC's profits related to their services for GSK and others. Alternatively, Mr. Straus is entitled, at his option, to recover statutory damages under 17 U.S.C. § 504(c).

**CLAIM FOR ATTORNEY FEES**

15. As a result of the Defendants' conduct, Mr. Straus has been required to retain counsel to bring this action. Mr. Straus is entitled to recover his attorneys' fees and costs under 17 U.S.C. § 505.

**JURY DEMAND**

16. The Plaintiff demands a trial by jury.

**PRAYER**

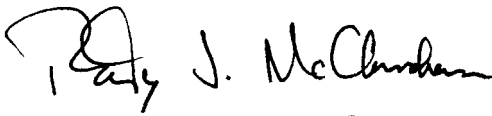
The plaintiff requests judgment against the Defendants for the following:

- a. Plaintiff's actual damages;
- b. The Defendants' profits derived from the copyright infringement;
- c. In the alternative, statutory damages;
- d. A preliminary and a permanent injunction restraining the Defendants from preparing derivative works and from reproducing and distributing copies and displaying infringing materials;
- e. An order impounding any infringing materials and anything used to produce infringing materials and, upon final judgment, an order requiring the destruction or other reasonable disposition of the infringing materials;
- f. Pre-judgment and post-judgment interest as provided by law;
- g. Reasonable attorneys' fees;
- h. Costs of suit;
- i. Such other and further relief to which the plaintiff may justly be entitled.

Respectfully submitted,

McCLANAHAN & CLEARMAN, L.L.P.

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By:  *By permission*  
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JS 44 (Rev. 3/99)

## CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

Robert D. Straus, Jr.

## DEFENDANTS

DVC Worldwide, Inc.  
SmithKline Beecham Corporation**H-04-4625**(b) County of Residence of First Listed Plaintiff Harris County, TX  
(EXCEPT IN U.S. PLAINTIFF CASES)County of Residence of First Listed Morris County, NJUNITED STATES COURTS  
SOUTHERN DISTRICT OF TEXAS  
FILED  
PLAINTIFF CASES ONLY  
IN REMOVAL AND REMAND CASES, USE THE LOCATION OF THE  
AND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

Randy McClanahan, McClanahan & Clearman LLP  
700 Louisiana, Suite 4100  
Houston, TX 77002 713/223-2005

Attorneys (If Known)

DEC 10 2004

William H. Milby, Clerk of Court

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State ☐ 1 ☐ 1 DEF Incorporated or Principal Place of Business In This State ☐ 4 ☐ 4 DEF
- Citizen of Another State ☐ 2 ☐ 2 DEF Incorporated and Principal Place of Business In Another State ☐ 5 ☐ 5 DEF
- Citizen or Subject of a Foreign Country ☐ 3 ☐ 3 DEF Foreign Nation ☐ 6 ☐ 6 DEF

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input checked="" type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

## V. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

## VI. CAUSE OF ACTION

(Cite the U.S. Civil Statute under which you are filing and write brief statement of cause. Do not cite jurisdictional statutes unless diversity.)

17 U.S.C. Sec. 501, copyright infringement

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

12/10/04

SIGNATURE OF ATTORNEY OF RECORD

Randy J. McClanahan by permission RHE II

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